No. 87-1661

In The

Supreme Court of the United States

October Term, 1987

ASARCO INCORPORATED, et al.,

Petitioners,

v.

FRANK KADISH, et al.,

Respondents.

On Petition for Writ of
Certiorari to the Arizona Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ALASKA MINERS ASSOCIATION, SOUTHWESTERN MINERALS EXPLORATION ASSOCIATION, AND GSA RESOURCES, INCORPORATED, IN SUPPORT OF PETITIONERS

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INTRODUCTION

ASARCO Incorporated petitioned this Court for a writ of certiorari in the above captioned case. Movants, Alaska Miners Association, GSA Resources, Incorporated,

and Southwestern Minerals Exploration Association (movants hereinafter are referred to as Miners), have obtained permission from petitioners to file this brief amicus curiae in accordance with Supreme Court Rule No. 36.1. A letter of consent has been lodged with the Clerk of the Court. Miners have attempted to obtain permission from the State of Arizona and the respondents to file the attached brief amicus curiae in support of petitioners. This permission has not been forthcoming.

Because of the serious impacts that the Arizona Supreme Court's decision has had on the Arizona miners, because of the serious implications this case has in the interpretation of *Alaska's* Statehood Act, and because of the contribution Miners can make to the Court's understanding of these issues, this motion is filed. Miners seek leave of this Court to file the attached brief amicus curiae pursuant to Supreme Court Rule No. 36.1.

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ARGUMENT

LEAVE TO FILE THE ATTACHED BRIEF AMICUS CURIAE SHOULD BE GRANTED BECAUSE AMICI HAVE CRUCIAL INTERESTS IN THE OUTCOME OF THE CASE AND CAN AID THIS COURT'S UNDERSTANDING OF THE ISSUES

Miners represent a coalition of mine owners, leaseholders, and potential leaseholders or owners of prospecting permits from both Arizona and Alaska who have joined together to demonstrate to this Court the serious adverse consequences that will result if the decision of the Arizona Supreme Court is not overturned. Miners represent a

range of interests that have a vital stake in the proper interpretation of the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, and the Jones Act of 1927,[1] Pub. L. No. 570, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. § 870). The interests of Miners are described in more detail below. By receiving the accompanying brief amicus curiae this Court will better understand why the petition for writ of certiorari should be granted.

A. The Alaska Miners Association

The Alaska Miners Association (AMA) is a nonprofit, membership, industry association. AMA has approximately 1,500 members, most of whom reside throughout the State of Alaska. Some reside in the western United States or Canada. It is the stated policy of AMA to support environmentally sound mining operations throughout the State of Alaska. AMA is active in supporting and defending a balanced approach towards the regulation and leasing of mining claims. Towards this end, the Alaska Miners Association previously filed in this Court a petition for writ of certiorari in *Alaska Miners Association v. Trustees for Alaska,* as did the State of Alaska in *State of Alaska v. Trustees for Alaska,* Case Nos. 87-205 and 87-206. These petitions are presently pending before this Court and concern the proper interpretation of the Alaska Statehood Act.

Many individual members of AMA own leasehold interests in mineral lands in the State of Alaska. The statutory framework for the state's leasing system is controlled

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[1] Also known as the School Lands Act of 1927.

by the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (codified at note preceding 48 U.S.C. § 21). Because both the Alaska Statehood Act and the Jones Act, granting mineral lands to Arizona and imposing a leasing system, contain nearly identical language, it is imperative that there be a proper interpretation of these statutes. By granting ASARCO's petition in this case, this Court will help all leaseholders in Alaska, as well as the Alaska courts, to better understand the actual meaning and applicability of the Alaska Statehood Act's leasing language that was first used in the Jones Act.

Until the uncertainty over the proper interpretation of the Jones Act type leasing language is resolved, leaseholders in Alaska are caught in an extremely difficult position. They have no way of determining whether or not a mineral property can be economically mined because they have no way of determining what the lease terms will be. About all that is certain is that if this Court does not correct the decisions of the Alaska and Arizona Supreme Courts, and if the legislatures of these respective states are usurped of their ability to set up leasing statutes, then leaseholders will be injured.

Unfortunately, the resolution of just one of these cases will not solve the legal ambiguities faced by the mining communities in Arizona and Alaska. The Alaska Statehood Act case will not resolve the difficulties that stem from that portion of the Arizona Court's decision that interpretated the 1910 Enabling Act. Nor will a resolution of the Arizona case resolve issues surrounding the unique legislative history of the Alaska Statehood Act. Together, however, a resolution of both cases should once and for all

end the dispute over the applicability and meaning of leasing requirements for lands that are mineral in character.

B. Southwestern Minerals Exploration Association

The Southwestern Minerals Exploration Association is a group of mineral exploration professionals who are actively involved in the shaping of natural resource development public policy. Southwestern Minerals Exploration Association has been active in promoting and supporting legislation at the state level and in fostering better relationships with state land user groups. The association believes that the Arizona Supreme Court's decision will result in higher royalty rates and highly uncertain maximum levels of lease payments. This in turn will discourage mineral exploration and production from state mineral lands in Arizona. Instead, the emphasis for exploration would shift towards the remaining federal lands in Arizona and lands in other states and nations.

Increased royalty payments, combined with state corporate income taxes, severance taxes, sales and use taxes, and property taxes will result in the closing of some productive mines resulting in a decline in tax revenues and lost economic opportunities. In the surviving mines, the "cutoff grade," the lowest grade of mineral produced, will be increased meaning that mines will have a shorter life and more low grade ore will be left in the ground.

In order to foster a successful state land minerals exploration program, there must be an incentive to explore on state lands. Specifically, there must be some assurance that if a prospector actually finds a mineral deposit the

prospector will have a preferential right to lease that prospect and that the royalty payments will guarantee not only a fair return to the state, but also a fair and *predictable* return to the miner. The Arizona Supreme Court's assertion that there must be an appraisal and auction of all mineral lands would foreclose this opportunity.

As a direct result of the Arizona court's decision at least one member of the Southwestern Minerals Exploration Association has lost substantial business when an outside investor withdrew from a lease development program because of the uncertainties created by the court's decision.

C. GSA Resources, Incorporated

GSA Resources, Incorporated (GSA), is a small family owned and operated mineral consulting and mining company. In terms of finances and resources, it is an entirely different class of mining company compared to ASARCO. The impacts from an adverse interpretation of the Arizona leasing laws will be felt much more directly by small companies like GSA. GSA is operating leases on 1,659.26 acres from the State of Arizona.[2] GSA first applied for prospecting permits in 1982 and it has mined some of these leases for industrial minerals since 1986. A substantial commitment of resources has been expended to develop and operate these leases. Continued operation of these leases is crucial to the company's ability to utilize these investments and quite possibly to its very existence.

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2 In order to obtain financing and bonding, the leases are personally owned by the family owners of GSA who are personally liable for any financial obligations.

In addition to the acres under lease, GSA's owners have 255.72 acres covered by prospecting permits for which it is attempting to convert to leases pursuant to Arizona Revised Statute § 27-254 (Supp. 1987). It has already paid for the right to prospect on this land anticipating that if its exploration efforts were successful, it would have a right to lease the land. GSA would not have pursued any exploration on these lands without assurances that it would also have the right to mine the minerals it had located. Nor could GSA have prudently explored on the state lands without knowing what its royalty payments would be in advance.

Because the Arizona Supreme Court has determined these leases to be in violation of the Enabling Act of 1910, GSA Resources cannot determine its rights and is in a state of turmoil. The Arizona Supreme Court remanded the case to the trial court to grant "such relief as may be appropriate." GSA, like all leaseholders in the state, has no way of knowing, for example, whether or not it must pay retroactive fees and royalties to make up for the difference between the previous leasing system and whatever system is formulated in conformance to the court's order. It has no way of knowing whether its contractual leasing obligations with the state are still valid, or whether they have been voided by the Supreme Court's decision.

GSA has no assurance that, if it continues to comply with the preexisting statutory duties with regard to these leases and prospecting permits, that it will be permitted to retain any interest in these leases, or if they must be auctioned to the highest bidder as implied by the Supreme Court. Finally, GSA has no way of knowing whether it has any property rights left in its leases or if those leases

are a complete nullity. About all that is certain is that the royalty rate, found by the Arizona Supreme Court not to be based on fair market value, will rise with an adverse effect on the viability of GSA's mining operations. In short GSA is in the untenable position of having to meet its obligations on its leases while not knowing what return, if any, it will receive from those leases.

CONCLUSION

There is a growing tendency for state courts to assume the prerogatives of legislative decision making for state land mineral leasing systems. Unfortunately, without the benefit of the legislative process, the consequences of this judicial legislation have been harsh for citizens who depend on mineral leasing on state lands. Movants for amicus curiae status represent a varied class of individuals in the mining community, both inside and outside of Arizona, who will be affected by the adverse precedent established by the Arizona decision. Furthermore, Miners have substantial expertise in the field of mineral leasing practices and statutes that will be of benefit to this Court's understanding of the case.

For these reasons, Miners respectfully request leave to file the attached brief amicus curiae.

DATED: May 24, 1988.

Respectfully submitted,

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INTERESTS OF AMICI

The interests of amici are outlined in the motion for leave to file brief amicus curiae.

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OPINIONS BELOW

The decision of the Supreme Court of Arizona is reported in *Kadish v. Arizona State Land Department,* 747 P.2d 1183 (Ariz. 1987). The decision was issued on December 10, 1987, and reconsideration denied February 2, 1988. The Arizona Supreme Court's decision was from an appeal of a ruling by the Maricopa County Superior Court in *Kadish v. Arizona Land Department,* Case No. C433745. Both opinions are reproduced in ASARCO's appendix to its petition for writ of certiorari.

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) as explained in ASARCO's petition at 1-2.

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STATUTES INVOLVED

Amici adopt petitioner ASARCO's statement of the statutes involved found in ASARCO's petition at 2. The relevant statutes are reproduced in appendix E of ASARCO's petition.

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STATEMENT OF THE CASE

Amici adopt the statement of petitioners at 2-7 of ASARCO's petition for writ of certiorari.

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REASONS FOR GRANTING THE WRIT

A. The Leasing of State Mineral Lands Is Subject To Complete Legislative Jurisdiction

The Arizona Supreme Court has eliminated the distinction between mineral and nonmineral lands in the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, and the Jones Act of 1927, 43 U.S.C. § 870. To put is succinctly, Congress granted the new State of Arizona only *nonmineral* lands in the 1910 Enabling Act; while it granted *mineral* lands in the 1927 Jones Act. The nonmineral lands are and always have been the subject of the appraisal and auction requirements found in the 1910 Act; the mineral lands were made expressly subject to the leasing provisions in the 1927 Act. No subsequent amendment to the Enabling Act encumbered the leasing of mineral lands with any appraisal and auction requirements.

1. The Distinction Between Mineral and Nonmineral Lands is Critical to Understanding the Scope of the Legislature's Discretion

The distinction between mineral and nonmineral lands is crucial not only in Arizona, but in other western states as well. Alaska is a prime example. In *Trustees for Alaska v. State of Alaska,* 763 P.2d 324 (Alaska 1987), the Alaska Supreme Court correctly found that nonmineral lands, *i.e.,* those lands not known to have been of mineral character at the time they were selected by the State of Alaska are *not* subject to the mineral leasing provisions of Section 6(i) of the Alaska Statehood Act, 72 Stat. 339 (1958), codified at the note preceding 48 U.S.C. § 21. Such nonmineral lands are subject to the same provisions for

all general land grant lands found in Sections 6(a) and 6(b) of the Alaska Statehood Act just as nonmineral lands in Arizona are subject to the special 1910 Enabling Act requirements that include appraisal and auction.[1]

Mineral lands, on the other hand, are subject to the express leasing provisions of the Jones Act which are repeated in the Alaska Statehood Act. Virtually identical language in both Acts calls for mineral lands to be leased "as the State legislature may direct." Herein lies the problem.

2. The Language "to be leased as the State legislature may direct" Provides the Arizona Legislature and Other State Legislatures Such as Alaska's with Broad Discretion in Fashioning Leasing Systems for Mineral Lands

Both the Arizona and Alaska Supreme Courts ignored the "as the State legislature may direct" provision, albeit for different reasons. The Arizona Supreme Court thought that the provision was superseded by a more general reference in the Jones Act to the state's earlier Enabling Act. The Alaska Court thought that the state legislature was required to follow an example of a federal statute, the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. § 181. In other words both courts thought Congress had

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[1] Lands on which minerals were found after they were acquired by Arizona (or Alaska) are not transformed into "mineral" lands; they remain nonmineral. *See, e.g., Wyoming v. United States,* 255 U.S. 489, 498 (1921); *United States v. Sweet,* 245 U.S. 563, 572-73 (1918).

somehow limited the unambiguous language "as the State legislature may direct." Congress, however, had not.[2]

The legislatures of both states had distilled their mineral leasing statutes into systems that maximized incentives to develop the state's mineral lands while ensuring a fair return, measured in both direct revenues and gross economic activity to the states. The legislative process is never simple, and it never satisfies all the parties. Nevertheless, because the systems were created "as the State legislature may direct," and because the legislatures have been careful to balance competing interests, any attempt to second-guess these legislative decisions must be carefully scrutinized.

3. Subsection (b) of the Jones Act Provides the Complete Mechanism for Leasing Mineral Lands

The language in the Jones Act is not empty of meaning. Words in statutes should not be read to be mere formalism without substance. *See, e.g., Inhabitants of Montclair Township v. Ramsdell,* 107 U.S. 147, 152 (1883) (interpretation of bonding statute); 2A *Sutherland Statutory Construction* § 46.06 (4th ed. 1984). The Arizona Supreme Court ignored the crucial fact that the Jones Act *followed* the Enabling Act of 1910 and therefore must take precedence over that earlier Act. Because the Jones Act

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[2] There also remains the issue of whether the mineral lease provisions were made applicable to all mineral lands or only a subset of the mineral lands. Both the Alaska Statehood Act and the Jones Act require that "such" lands be leased. "Such" lands can mean *all* mineral lands or just those lands referred to in the immediate preceding sentence—mineral lands where the surface estate has been "sold, granted, deeded or patented."

provides a mechanism for administering the newly granted mineral lands *that* mechanism should be used.

Subsection (a) of the Jones Act provides that "the grant of numbered mineral sections under this section shall be of the same effect as prior grants." Subsection (b) of the Jones Act contains the clause that gives the state legislatures authority to lease minerals as they direct. The Arizona court interpreted the general provisions of Subsection (a) of the Jones Act to have imposed certain Enabling Act requirements upon mineral leases thereby eviscerating the liberal leasing provisions of Subsection (b). This is incorrect for several reasons.

First, while the 1927 Act granted mineral land to the states, it did not provide an actual mechanism for transfer of title to the states. That was accomplished in 1934. *See* Act of June 21, 1934, 48 Stat. 1185, 43 U.S.C. § 871 (*repealed* by Pub. L. No. 94-579, 40 Stat. 2792). It is significant that Congress provided in the 1934 legislation that all patents shall show "the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any." *This* sort of language is the logical consequence of Subsection (a) of the Jones Act. Furthermore, without evidence that any mineral land patents contain the leasing restrictions discovered by the Arizona court, such restrictions should not be implied.

Second, when Congress amended the Enabling Act in 1936 the legislative history plainly demonstrated that Congress knew that the nonmineral lands granted in the Enabling Act were not subject to *any* lease provisions. In S. Rep. No. 90, 70th Cong., 1st Sess. 4 (1928), Secretary of the Interior Hubert Work stated "but no provision

was made in the [enabling] Act for the development or protection of minerals on state lands." In other words, there was no mechanism to lease minerals found on nonmineral lands that had been granted by the Enabling Act. Nor could such nonmineral lands be subject to the lease provisions of the Jones Act: "The provisions of this Act of 1927 would not apply to lands or minerals therein that might be granted under the Act of June 20, 1910." *Id.*[3]

In order to remedy this situation, the 1936 amendments were passed which provided a mechanism for the leasing of such nonmineral lands that contained minerals. *See* Act of June 5, 1936, ch. 517, 49 Stat. 1477 (providing for the leasing "as the State legislature may direct" of said lands for mineral purposes"). This amendment did *not* set up a lease system for these lands with an appraisal and auction requirement. It set up a lease system for these nonmineral lands just like the lease system found in the Jones Act, with the legislature directing the leasing. Nor did the 1936 Act affect in any way the provisions of the Jones Act. It did not impose any new lease conditions upon the mineral lands granted in the Jones Act. In fact, there is no evidence that Congress intended the 1936 amendments to apply to the Jones Act mineral lands. Congress simply provided the identical method for all classes of mineral bearing lands: "as the State legislature may direct."

There are fundamental differences between the leasing of buried mineral deposits and the leasing of ordinary

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[3] Work also discussed what the provisions of the Jones Act leasing provisions were, namely leasing as "the State legislature may direct," the creation of a trust, and a provision for forfeiture. *Id.* Notably absent is any discussion of appraisal or auction.

land. Values for mineral deposits cannot be accurately determined until a suspected deposit is actually drilled and bulk sampling is performed. No one would go through the expense of drilling and sampling unless there was a *guaranteed* right to a lease and the lease terms were known in *advance.* In the minerals industry, the normal practice is to lease potential mineral lands for a set term of years with a fixed rental, and a net smelter return in case any minerals are discovered. *See generally* Rocky Mtn. Min. L. Inst., 3 *American Law of Mining* (2d ed. 1987). An appraisal and auction requirement for the leasing of mineral deposits would be extremely illogical. An appraisal and auction system would stifle incentives for exploration and development. Moreover, there is no indication that Congress meant to impose such a system on the leasing of mineral deposits.

Furthermore, a contemporaneous reading of the 1936 amendment is provided by the 1940 mineral leasing statute enacted by the Arizona legislature. Long continued and contemporaneous and practical interpretations of a statute by the executive officers charged with its administration and enforcement and by the public constitutes an invaluable aid in determining the meaning of a doubtful statute. 2A *Sutherland Statutory Construction* § 49.03; *Edwards' Lessee v. Darby,* 25 U.S. 206, 210 (1827). That 1940 statute, Laws of Arizona, ch. 78, § 4(b), established a royalty rate of "five percent of the net smelter or mint returns." This has been the long-standing law for nearly a half century. It has provided stability to the Arizona mineral exploration and development industries. It has worked well, and is fully consistent with the Jones Act and the 1936 amendments to the Enabling Act.

Finally, there is also no evidence that the 1951 Enabling Act amendments, Pub. L. No. 82-44 (1951), had any effect whatsoever on the leasing of any minerals, whether the minerals were on mineral lands originally granted by the Jones Act or nonmineral lands granted by the Enabling Act. The amendment was designed to facilitate oil and gas development by increasing the length of time that an oil deposit could be leased. The legislation was all encompassing and designed to make it absolutely clear that such leases would be practical and without unnecessary bureaucratic hindrances. That it expressly excluded auction and appraisal requirements was probably from an overabundance of caution. It is ***not*** an indication that such requirements were applicable to other mineral deposits.

B. Legislatively Derived Mineral Leasing Systems Provide Maximum Returns to the States

Congress declined to dictate specific leasing provisions for minerals granted under the Jones Act. The only requirement found in the applicable federal statutory law is that the minerals on such lands be leased "as the State legislature may direct." In Arizona the legislature interpreted this to allow it to set up a leasing system with 5% royalties and provisions to reward prospectors with the fruits of their exploration labors. The Arizona provision for a 5% net royalty lease provides incentive to the development of a small minerals industry for the maximum benefit of the schoo trust.[4]

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[4] In Alaska the state legislature interpreted this to be a broad grant of authority, and the legislature enacted a lease location

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The Arizona Supreme Court examined a report in evidence from the Arizona auditor general and decided that if Arizona raised its lease rates, it could gain higher state revenues. The report was flawed. For example, it neglected to account for the differences between different mineral commodities. It neglected to note that states with higher royalty rates often had the lowest overall revenues from mineral leases. The *Kadish* dissent by Justice Cameron recognized some of these fallacies when he noted that "the Legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands." *ASARCO* appendix at 36a, *Kadish,* 747 P.2d at 1200.

Courts are *not* appropriate economic policy decision making bodies. It is not the role of courts to determine what particular leasing scheme will provide for the maximum benefit to the State of Alaska or the school trust of Arizona. The courts are simply ill-equipped to deal with this sort of complex problem that is the province of the state legislative bodies. That is precisely why Congress provided that the leasing systems for mineral lands in the western states should be as the *legislatures* may direct. Congress did not provide any role for the state courts to second-guess these legislative decisions.[5]

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provision designed to encourage the exploration and development of mineral resources in Alaska. This has provided a substantial boost to the stated goal in the Alaska constitution of settling the lands of Alaska while providing an economic base and production license revenues.

[5] In addition it must be noted that under both the Alaska Statehood Act and the Jones Act only the attorney general is

(Continued on following page)

C. Congress Did Not Intend To Infringe upon Arizona's Sovereignty

The creation of the State of Arizona was not a case where the federal government has merely granted a favor or gift to an individual with strings attached, in which the strings must be taken, as the "bitter with the sweet." *Arnett v. Kennedy,* 416 U.S. 134 (1974). Rather, it is a case where the federal government is imposing conditions on one of the most fundamental of attributes of sovereign state government, the state's right to exercise unfettered jurisdiction over all of its property no matter what the source. The hyperspecific conditions on the leasing of state lands found in the Arizona Enabling Act, as interpreted by the Arizona Court, would be repugnant to the concept of independent soverign state government. The original Enabling Act restrictions were, perhaps, enacted because of the federal government's legitimate paternalistic concern over the way certain states managed their lands. This concern, however, does not necessarily justify the infringement on independent state decision making as found in the 1910 Enabling Act.

Fortunately, the issue of the objectionability of the 1910 Act need not concern this Court. Because the 1910 Enabling Act appraisal and auction requirements do not govern the disposition of mineral lands, only the much less

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empowered to bring suit to enforce the provisions of the Act. Here, Kadish brought suit under the authority of the Enabling Act. However, if this Court finds that the Jones Act alone affects the leasing of mineral lands, and that the Enabling Act is not applicable to this question, then it must find that Kadish has no jurisdiction to maintain the suit.

intrusive conditions of the Jones Act and the amended Enabling Act are of concern to mineral leasing. Congress wisely left it to the state legislature to establish a mineral leasing system.

CONCLUSION

The United States Congress gave to the legislatures of the western states, including Alaska and Arizona, the discretion to create their own mineral leasing systems. These systems are designed by the state legislatures to best meet state needs. They are tailored for local concerns. The Arizona Supreme Court incorrectly determined that Congress placed additional strictures on the mineral leasing requirements. This, naturally enough, has implications for a number of western states. This Court should grant ASARCO's petition for writ of certiorari in order to determine what, if any, restrictions Congress placed upon the leasing of state mineral lands and deposits.

DATED: May 24, 1988.

Respectfully submitted,

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